WILLIAM J. MONTGOMERY ET AL.

IBLA 94-559 Decided January 29, 1997

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring mining claims abandoned and void. MMC 9058, MMC 9070 through MMC 9072, and MMC 92039 through MMC 92044.

Reversed.

1. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A decision rejecting a small miner exemption and declaring claims abandoned and void for failure to pay rental fees on the grounds that the claimants own more than 10 claims is properly reversed where the claimants show that they filed certifications of exemption for the 1993 and 1994 assessment years on Aug. 23, 1993, listing only 10 claims and other evidence demonstrates that they had abandoned any additional claims previously held as of the date of the submission of their certification of exemption.

APPEARANCES: William J. Montgomery, Butte, Montana, and Billy J. Montgomery, Bozeman, Montana, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

William J. and Billy J. Montgomery have appealed from so much of a decision of the Montana State Office, Bureau of Land Management (BLM), dated May 31, 1994, as declared unpatented mining claims MMC 9058, MMC 9070 through MMC 9072, and MMC 92039 through MMC 92044 abandoned and void for failure to timely pay the rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1378-79 (1992) and 43 CFR 3833.1-5 for the 1993 and 1994 assessment years. For the reasons set forth below, we reverse.

On August 23, 1993, claimants filed certifications of exemption from the rental fees imposed by the Act for each of the assessment years ending September 1, 1993, and September 1, 1994. These certifications were filed in lieu of submission of annual rental payments of $100 for each claim for each assessment year under a provision of the Act known as the small

miner exemption which waived rental payments upon a showing, inter alia, that the claimant held no more than 10 mining claims. Both certifications listed only 10 mining claims. 1/ By notice dated April 6, 1994, BLM informed claimants it could not accept those documents because its records indicated claimants held an interest in more than 10 claims when the exemptions were filed. 2/ BLM afforded claimants an opportunity to establish that they had reduced their holdings to 10 or fewer claims as of August 31, 1993.

In response thereto, claimants submitted notarized statements declaring that they had abandoned eight of their claims prior to the August 31, 1993, deadline, and therefore held only 10 claims as of that date. In its decision, BLM noted claimants' affidavits but, ostensively relying on this Board's decision in Lee H. & Goldie E. Rice, 128 IBLA 137 (1994), held that these statements were insufficient to establish entitlement to a small miner exemption, where BLM records, as of August 31, 1993, indicated otherwise:

> Since your letters of abandonment for 8 of your mining claims were not received in this office until April of 1994, you failed to meet the requirements within the timeframe established by law and regulation (i.e., on or before August 31, 1993).
>
> * * * * * * *
>
> You failed to meet the exemption requirements in that as of August 31, 1993, the records of this office indicate you held more than 10 mining claims and no rental was paid for the above-listed mining claims.

(Decision at 2). Claimants timely appealed from this decision.

In their statement of reasons, claimants argue they abandoned the eight additional claims cited by BLM prior to the August 31, 1993, date. Claimants note that, not only did they only list 10 claims on their certification for exemption, but also that the certificate of labor they filed with the Beaverhead County Recorder's Office on October 14, 1993, and subsequently submitted to BLM had listed only the 10 claims for which they had sought a small miner exemption. This was in contrast to previous years in

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1/ The claims listed were the Cross Fox (MMC 9058), Black Bear (MMC 9070), Silvertip Bear (MMC 9071), Silver Fox (MMC 9072), Silver Age (MMC 92039), Silver Bell (MMC 92040), Silver Coin (MMC 92041), Silver Fish (MMC 92042), Silver Maple (MMC 92043), and Silver Smith (MMC 92044).

2/ There was some confusion as to how many claims BLM's records indicated were owned by claimants. Thus, in the April 6 decision, BLM stated that their records indicated that claimants owned 25 mining claims. This figure was lowered to 18 in the May 31, 1994, decision ultimately rejecting appellants' filings.

which they had listed all 18 claims on their affidavits of labor. Claimants assert that their actions clearly establish the intent to abandon the eight additional claims on which BLM predicated its rejection of their certification of exemption.

[1] The relevant provisions of the Act, enacted by Congress on October 5, 1992, provide, in pertinent part, that:

> [F]or each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314(a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 * * *. [Emphasis added.]

106 Stat. 1378. The Act contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of the $100 rental fee on or before August 31, 1993. 106 Stat. 1378-79.

The Act further provided, subject to various conditions, for an exemption from the payment of rental fees for claimants holding 10 or fewer claims, a provision generally referred to as the small miner exemption. Id. On July 15, 1993, the Department promulgated regulations implementing the rental fee provisions of the Act, see 58 FR 38186, including sections governing rental fee exemption qualifications and filing requirements, later codified at 43 CFR 3833.1-6 and 3833.1-7 (1993). Those regulations stipulated that a small miner choosing not to pay the rental fee was required to file a separate statement on or before August 31, 1993, for each assessment year the exemption was claimed. The regulations also delineated various items that each statement was required to contain. See 43 CFR 3833.1-7(d) (1993).

In the instant case, claimants timely filed certifications of exemption for both years which satisfied the requirements of 43 CFR 3833.1-7(d) (1993), but BLM rejected the certifications because it concluded that the claimants held more than 10 unpatented mining claims. As noted above, claimants assert that they decided to drop 8 claims and maintain only 10 in order to satisfy the small miner exemption requirements. This assertion finds corroboration in their affidavit of labor for the 1993 assessment year, which they recorded with the Beaverhead County Recorder on October 14, 1993, and filed with BLM on November 16, 1993, in which only the 10 placer claims for which the small miner exemption was sought were listed as claims upon which the assessment work had been performed.

BLM rejected claimants' showing based on its interpretation of the Board's decision in Lee H. & Goldie E. Rice, supra. Our review of the Rice decision, however, convinces us that BLM has misinterpreted the scope of our holding therein. In relying on our opinion in the Rice case, BLM emphasized the language of the headnote which declared that a BLM decision would be affirmed "[w]here BLM records disclosed that on Aug. 31, 1993, a mining claimant held in excess of 10 mining claims on such lands * * *." Id. at 137. We believe, however, that BLM failed to give sufficient weight to the qualifying language which appeared immediately after the statement quoted above. Thus, the headnote continued "and where on appeal the claimant failed to provide any evidence to show otherwise." This modifying language is critical to understanding our holding in Rice.

The Rice case did not involve a situation in which claimants had contended that they had abandoned claims in excess of the statutory maximum for the purpose of qualifying for the small miner exemption. On the contrary, the claimants in Rice did not even assert that they had abandoned any of their claims as of the time of the submission of the certifications. Rather, the entire thrust of their appeal was that they were provided insufficient time to adequately comply with the filing requirements of the Act, an assertion expressly rejected by the Board in the Rice decision. Id. at 140. The ratio decidendi of the Board's decision was not that the mere fact that BLM's records indicated that mining claimants held more than 10 claims was sufficient to require rejection of an exemption certification but rather that this fact, coupled with the claimants' failure to provide any evidence to the contrary, supported BLM's rejection of a requested exemption. Such, indeed, has been this Board's interpretation of the Rice decision.

Thus, in both Calvin W. Barrett, 134 IBLA 356 (1996) and Washburn Mining Co., 133 IBLA 294 (1995), claimants had timely filed certifications of exemption for both years, but BLM denied the exemption after concluding that they owned more than 10 claims. On appeal, the claimants in both cases argued that they had abandoned other claims for the purpose of meeting the requirements for obtaining the small miner exemption. In both cases, these assertions were corroborated by statements of annual assessment work which had been recorded locally before the August 31 deadline and which covered only the claims listed on their certifications of exemption. The Board found these showings sufficient to establish that the claimants had owned 10 or fewer claims as of the date they filed their certifications seeking the small miner exemption.

Admittedly, unlike the claimants in Barrett and Washburn, appellants here did not record an affidavit of labor for the 1993 assessment year until October 14, 1993, after the rental fee deadline had passed. We do not, however, view this distinction as critical. Abandonment, as we have noted in the past, "is a concept well known to mining law, but its basis is the traditional law of abandonment--relinquishment of possession together with the subjective intent to abandon." Department of the Navy, 108 IBLA 334, 338 (1989), quoting Oregon Portland Cement Co., 66 IBLA 204,

207 (1982). The relevance of the local filings in Barrett and Washburn was not that they effected an abandonment of the claims 3/ but rather that they provided evidence of the subjective intent of the claimants to abandon the claims.

The local filings in the instant case provide the same evidence of the preexisting intent to abandon, particularly since they were made prior to any action on the part of BLM to reject the exemption certifications.

The facts of this case convince us that appellants intended to maintain ownership of only the 10 identified claims when they filed certifications of exemption and had abandoned those claims not listed. Thus, we find that BLM's decision declaring the 10 claims included in the request for exemption to be abandoned and void was in error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed as to the claims which are the subject of this appeal.

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James L. Burski
Administrative Judge

I concur:

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R.W. Mullen
Administrative Judge

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3/ In point of fact, they did not. Failure to perform assessment work did not, at least prior to the adoption of the 1992 Act, result in an abandonment of the claim under either 30 U.S.C. § 28 (1994) or 43 U.S.C. § 1744(a) (1994). As we noted in United States v. Haskins, 59 IBLA 1, 88 I.D. 925, 975 (1981), historically, failure to perform assessment work did not automatically invalidate a mining claim under 30 U.S.C. § 28 (1994) but rather made it subject to relocation by a third party or withdrawal by the Government. Failure to record annual assessment work or notices of intention to hold, as required by section 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1994), would result is a conclusive statutory presumption of abandonment, but this would not arise until the end of the calendar year when it could be determined that the claimant had failed to file evidence of such work on or before Dec. 30. Thus, the relevance of the local filings in Barrett and Washburn was not that they constituted an abandonment of all claims not listed thereon but rather that they provided evidence of a preexisting intent to abandon those claims.